BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES BANKS, JR. Claimant VS. **MAGNA CORPORATION** Respondent AND **SAFECO INS. CO. OF AMERICA** Insurance Carrier	)	Docket No. 255,009

ORDER

Respondent and its insurance carrier requested review of the November 3, 2004 Review and Modification Award issued by Administrative Law Judge (ALJ) Bryce D. Benedict. The Board heard oral argument on April 26, 2005.

APPEARANCES

Patrick Nichols, of Lawrence, Kansas, appeared for the claimant. Gregory Worth, of Roeland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties agreed that respondent's request for review and modification, filed on October 1, 2003 would, by statute, relate back only 6 months, to April 1, 2003. The parties further agreed that claimant's post-injury average weekly wage during that period and up to October 29, 2003 was $446.35. Thus, claimant's wage loss during this period was 38 percent, down from the 51.5 percent reflected in the original Award. When the 38 percent wage loss is averaged with the 63.5 task loss (which remained unchanged), and the pre-existing 10 percent is deducted, claimant's work

disability decreases to 40.75 percent. Thus, respondent agreed claimant's Award should be modified and recalculated to reflect this change. Therefore, the Board's sole focus will be on the claimant's change in wage as of October 29, 2003 when he was terminated from his post-injury job.

ISSUES

The ALJ granted respondent's request to modify the original Award to reflect claimant's decreased wage loss and his ultimate work disability.[1] In addition to modifying the Award for the period pre-dating the filing of respondent's request, the ALJ modified the Award for the period October 29, 2003 up to June 22, 2004, during which claimant had a 100 percent wage loss. This increased wage loss, in turn, increased the resulting work disability to 71.75 percent. Then, when claimant became re-employed on June 22, 2004, his average weekly wage became $320 a week, which results in a 55.7 percent wage loss. And as a result, his work disability must again be recomputed. When the 55.7 percent wage loss is averaged with the 63.5 percent task loss, less the pre-existing 10 percent impairment, the result is a 49.6 percent work disability which the ALJ awarded.

In making this determination, the ALJ was asked to consider whether claimant exhibited a lack of good faith in maintaining his employment with his subsequent employer by testing positive for THC (marijuana) in October 2003 following a random drug test. The ALJ concluded that the chain of custody relative to one of the test results was broken and as a result, those results were inadmissible. He did, however, admit into evidence the results of an earlier drug test completed at Stormont-Vail hospital, although he concluded that the test results were irrelevant under the circumstances.

The ALJ found claimant was fired for violating his then-employer's drug policy although there was "absolutely no evidence that the [c]laimant was impaired on the job, that he was suspected of being impaired, that he consumed illegal drugs while on the job or that he possessed illegal drugs on the job."[2] Thus, the ALJ believed respondent failed to establish that claimant demonstrated bad faith in maintaining his employment. And as a result, claimant's actual wage loss would be utilized in computing work disability, both during the period of 100 percent wage loss and up to and beyond June 2004 when claimant became re-employed earning $320 per week.

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[1] The ALJ concluded claimant's wage loss had decreased to 38 percent (as of February 2, 2003) and when averaged with the 63.5 percent task loss and a 10 percent credit for pre-existing functional impairment, claimant was entitled to a modified work disability Award of 40.75 percent, down from the original 47.5 percent for the 6 month period pre-dating the respondent's request. As evidenced by the parties' stipulations during oral argument, there is no dispute with this aspect of the ALJ's Award.

[2] ALJ (Review and Modification) Award (Nov. 3, 2004) at 3.

As an aside, the ALJ also declined to de-authorize claimant's treatment with Dr. Ethan Bickelhaupt. While he recognized that "[t]his may be needed, but the [r]espondent has only filed an application for review and modification and not to terminate treatment, therefore the [c]ourt is without jurisdiction to entertain this request."[3]

The respondent requests review of the ALJ's Award. Respondent argues that claimant violated his employer's drug policy, and in doing so, exhibited a lack of good faith and subjected himself to termination, an act that compels the trier of fact to impute a wage for purposes of calculating work disability. Accordingly, respondent contends the ALJ should have modified the Award to reflect claimant's diminished work disability based upon his rate of pay as of October 29, 2003, the date he was terminated from his job. This modification would reduce claimant's wage loss to 38 percent.

Respondent also believes the ALJ erred in sustaining claimant's counsel's objections to the LabCorp testing results as well as the information supplied by the Government Accounting Office, both offered into evidence during various depositions.

Finally, respondent urges the Board to reverse the ALJ's finding with respect to jurisdiction and terminate Dr. Bickelhaupt's treatment as part and parcel of respondent's request to review and modify the original Award.

Claimant maintains the ALJ's Award dated November 3, 2004 should be affirmed in all respects. Claimant contends that the results of the October 2004 drug test are unreliable as they do not reflect the therapeutic medications he was admittedly taking at the time and instead, reflect only a positive finding for marijuana. Thus, the test results could not, in fact, be his. Moreover, claimant asserts respondent has failed to establish the requisite chain of custody so as to assure the reliability and accuracy of the test results, and therefore, the test results were inherently unreliable and properly inadmissible. Finally, although this test result was used as a predicate for terminating his employment, claimant maintains that his conduct does not constitute a lack of good faith and as such, he is entitled to the increased wage loss in the re-calculation of his work disability as awarded by the ALJ.

Claimant also contends that respondent's efforts to remove Dr. Bickelhaupt as the authorized physician is unwarranted, improper and violates fundamental due process considerations. Claimant argues that respondent has provided no evidence to justify the removal of Dr. Bickelhaupt's services.

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[3] *Id.* at 2, footnote 1. During oral argument, the parties advised the Board that respondent has since filed a motion to address this issue.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the ALJ's review and modification Award should be affirmed.

On January 12, 2000, claimant was assigned to drive a forklift when he suffered a compensable injury. This claim was the subject of an Award entered on December 7, 2001. That Award was modified by an Order from this Board dated November 29, 2002, which granted claimant a 47.5 percent permanent partial general disability.

While treating for his injury, claimant was authorized to see Dr. Ethan Bickelhaupt, primarily for management of his chronic pain. Dr. Bickelhaupt is a psychiatrist who is board certified in pain medicine and has a certification in addictive medicine. Dr. Bickelhaupt concluded claimant "suffers from a pain disorder, which is chronic and related to his original work injury."[4] Claimant's pain was managed with heat, a TENS unit, massages, stretching exercises and medications. Claimant was first prescribed Oxycontin on October 16, 2000, during his second visit with Dr. Bickelhaupt. Claimant's original dose was 10 milligrams twice daily. This was increased to 20 milligrams twice daily on November 14, 2000. As of October 2003 claimant's dose was 60 milligrams twice daily. Currently, his dose is 80 milligrams twice daily. Dr. Bickelhaupt considers this a "moderate" dose of Oxycontin.[5] Claimant is also currently taking 10 mg of Ambien and 50 mg of Zoloft, all which Dr. Bickelhaupt prescribes.

It is a practice at Dr. Bickelhaupt's pain management center to monitor the patients intake of medication. For each visit to the center, the patient (including claimant) is to bring in their prescription bottle and the contents are counted. In addition, patients are required to enter into a pain management agreement in order to help ensure dosage compliance and responsibility. Violation of this agreement could result in dismissal from the pain management program. Dr. Bickelhaupt's testimony discloses no difficulties between himself and claimant in connection with claimant's prescription medications, including Oxycontin. Dr. Bickelhaupt last saw claimant on July 6, 2004, although the doctor concedes claimant is usually seen by an associate within the doctor's office.

Claimant was unable to return to his job with respondent, and after a period of unemployment, he obtained a position on October 22, 2001, at All American Kan Build (All American). Before beginning his employment at All American, claimant was subject to a drug screen. The results of this drug screen are not contained within the record, but claimant maintains he disclosed his use of Oxycontin, and that it was revealed by the pre-

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[4] Bickelhaupt Depo., Ex. 5 at 1.

[5] *Id.* at 15.

employment drug screen required by All American. His job offer was finalized and he began working.

Claimant's initial wage at All American was $8.75 an hour. On January 7, 2002, he received a raise to $9.50 an hour. Thereafter, on April 15, 2002, his salary increased to $10.25 an hour and again on February 2, 2003, to $10.55 an hour. Effective February 1, 2002, he became eligible for benefits and the employer's contribution for those benefits was $24.35 per week.

In June 2003, All American instituted a new drug policy that involved random testing. According to Kay Dayhoff, All American's Human Resources Manager, the new policy went into effect on June 16, 2003. The policy was placed on a table in the production area where claimant worked and Ms. Dayhoff testified she announced to the workers that it should be reviewed. The policy provides that any positive result based upon a drug screen will justify termination. It further provides that employees can seek assistance from the employer for substance abuse problems.

It is worth noting that the implementation of this policy was initially delayed because All American's shop was the subject of a unionization effort. While that process was pending, the random drug screening was held in abeyance. When the unionization effort failed, the policy was announced and thereafter, testing resulted. Claimant was among the first 4 people to be randomly tested. Claimant was also one of the individuals who was seeking to unionize All American's labor pool. Claimant attributes All American's decision to "randomly" test him to his unionization efforts. Kay Dayhoff denies there is any connection.

Claimant testified he was not aware of any random drug testing policy in advance of his drug screen. On October 22 or 23, claimant was told along with 3 others that he was selected for a random urine analysis and if refused, he would be fired.[6] Claimant complied. The group was taken to Osage Medical Center and urine samples were taken.

Before the test results were returned, Ms. Dayhoff testified that claimant came to her and disclosed he had smoked marijuana the weekend before the test. During his deposition, claimant refused to answer this question directly, asserting his Fifth Amendment rights, but he does not deny that this conversation took place.

There is no evidence as to who took claimant's urine sample at Osage Medical Center, nor the procedure used to label, log or transfer the sample from the collection spot to Stormont Vail Hospital. Carol Ann Thomas, the lab manager at Stormont Vail Hospital, testified that while Stormont Vail is associated with the Osage Medical Center, she has no information regarding the policies and procedures employed at that outlying center. All she

[6] Banks Depo. (July 23, 2004) at 11.

was able to say was that there was a regular courier service employed to retrieve the samples from Osage Medical Center and return them to Stormont Vail.

Ms. Thomas was, however, able to authenticate the document that reflects the chain of custody while in the Stormont Vail Hospital where a 7 panel legal drug screen was completed. Ms. Thomas testified that Ron Beuchat received the sample marked with claimant's name and that the sample was then tested by John Willis. Mr. Willis was not deposed and all that is known of him is that he voluntarily left his position with Stormont Vail Hospital at some point after the testing was done.

The sample was screened for a number of substances, including THC and opiates, which would include Oxycontin. The sample was positive for THC and nothing else. As per their policy, a second sample was then sent to LabCorp, another testing lab, for confirmation. Ms. Thomas is not familiar with the policies and procedures employed at LabCorp. She did know that a positive result at LabCorp would compel that lab to confirm the result by gas chromatography and that, in fact, was done in this case based upon the written reports contained within the file. LabCorp's testing revealed a positive THC with no opiates.

Ms. Thomas was asked what could explain a negative finding of opiates if the sample was taken from one who was regularly taking Oxycontin. She indicated that a negative result might have to do with a missed dosage or a low dosage or tampering could have taken place. Ms. Thomas testified that there is no other substance that would register as THC on a drug screen.

One week after the test, on October 29, claimant was contacted by Kay Dayhoff and was escorted to see Terry Burnett, the supervisor. Claimant was told that he failed his urine analysis and was terminated.[7] Claimant was not told anything specific about the test. He was given a piece of paper to look at, but he could not understand what was on it, and was not given anything to take with him when he left. Claimant was told he tested positive for THC (marijuana). He inquired about why the test apparently did not reveal his use of opiates, which he maintains he had regularly been taking for two years, and which were disclosed on the testing sheet. Claimant thought that maybe the results were not his and expressed that concern to Ms. Dayhoff.[8] Nothing further was done and claimant went on to apply for and receive unemployment benefits.

Dr. Bickelhaupt asked how it was possible a drug screen could disclose the use of THC and not disclose the opiates claimant had been prescribed and admitted taking.

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[7] *Id.* at 13.

[8] *Id.* at 15.

He indicated that the sensitivity of the test will dictate the results.[9] When asked, Dr. Bickelhaupt indicated that claimant's alleged use of marijuana is less problematic than the concern that claimant might be diverting the medications he is being prescribed.[10]

Respondent attempted to introduce a GAO report on Oxycontin. The ALJ rejected this piece of evidence. Similarly, he rejected the respondent's attempt to introduce the second drug test from LabCorp, as he concluded that respondent had failed to establish adequate foundation for the record.

After excluding that evidence, the ALJ agreed that respondent had established it was entitled to the requested Review and Modification pursuant to K.S.A. 44-528. He refused, however, to find claimant exhibited a lack of good faith based upon All American's termination in October 2004.

Both parties agree that the Kansas Appellate Courts have interpreted K.S.A. 44-510e to require workers to make a good faith effort to continue their employment post injury. A lack of good faith finding will result in an imputation of wage, thus lessening the ultimate work disability finding.[11] Alternatively, a good faith finding allows the fact finder to use a claimant's actual wage loss for the work disability computation.

Respondent contends the ALJ erred when he concluded claimant's termination from his employment at All American did not constitute a lack of good faith on claimant's part. Respondent argues that claimant's choice to "violate the laws of this State and the written policy of his employer is indeed an act of bad faith".[12] The respondent asks the Board to "find that as a matter of law the commission of an illegal act is an act of bad faith per say [sic] as it applies to retention of post-injury employment."[13] To do otherwise, respondent contends, would reward "claimant for his illegal drug usage by finding that he is entitled to a 100% wage loss on the date his drug usage led to his termination of employment."[14]

The Board has considered respondent's argument and finds the ALJ's review and modification Award should be affirmed.

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[9] Bickelhaupt Depo. at 27-28.

[10] *Id.* at 40.

[11] See e.g., *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999); *Beck v. MCI Services, Inc.,* 32 Kan. App. 2d 201, 83 P.3d 800 (2003).

[12] Respondent's Brief at 4 (filed Dec. 29, 2004).

[13] *Id.* at 5.

[14] *Id.* at 6.

There is no dispute amongst the parties that the Board's focus in this matter is on the parties' conduct in association with the claimant's drug screen in October 2003, and the results of that drug screen, if admissible. Likewise, there is no dispute that it is respondent's burden of proof to establish an entitlement to the review and modification sought.

The Board has reviewed the record as a whole and concludes this claim is governed by the principles set forth by the Court of Appeals in *Niesz*.[15] In *Niesz*, the injured claimant returned to work at an accommodated position following her compensable injury. After a time, a customer wrote a letter to her employer complaining about claimant's "undesirable people skills."[16] There was an item in the newspaper complaining of another incident involving claimant and her lack of customer service skills.[17] Although claimant contacted her supervisor about the complaints and attempted to explain them, she was never counseled about these events and was ultimately terminated.

Because she was fired and no longer receiving 90 percent or more of her pre-injury wage, claimant sought work disability benefits. In its review of the claimant's request for work disability, the Board concluded that claimant did not display any bad faith and in fact, demonstrated a strong work ethic. Her explanation for the events surrounding the complaints was reasonable, even in the view of her district manager. Nonetheless, the employer in *Niesz* went ahead and terminated her employment, explaining that because the complaints "ended up in the paper", she had to be fired as her employer just couldn't have this "type of thing . . in the newspaper."[18]

Like the employer in *Niesz*, All American terminated claimant from his accommodated position, but did so without investigating complaints asserted in connection with the very basis for its termination. Claimant has adamantly maintained that the drug screen results were inconsistent with his prescribed medications. While it is unacceptable that claimant smoked marijuana the weekend before his drug screen - a fact Ms. Dayhoff says he volunteered to her and a question he has refused to answer - there is an aura of suspicion surrounding the test results themselves. So much so that in the Board's view, it warranted further investigation - something All American failed to do.

First, there is absolutely no evidence on the collection of the initial urine sample. While it is true that there are no statutory requisites that must be satisfied in order to ensure

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[15] *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

[16] *Id.* at 738.

[17] *Id.*

[18] *Id.*

the admissibility of the drug screen in a review and modification proceeding,[19] there must be some indicia of reliability as a predicate for the admissibility of such results. And while the absolute lack of evidence on the initial acquisition of the sample alone did not, in the ALJ or the Board's view, defeat the admissibility of the urine sample, there are other questions that compromise the sample's authenticity and accuracy.

As requested, claimant disclosed his therapeutic drugs on the drug screen sheet. The uncontroverted testimony is that the Oxycontin claimant was taking, 60 milligrams 2 times a day, should have been shown in any drug screen. Yet, it did not. When claimant discovered this, he immediately questioned the drug screen and its results. Respondent did nothing to address his concerns. All American seemed unconcerned with his protestations and pressed ahead to terminate him.

Respondent attributes this to claimant's obvious diversion of the drug. Yet, Dr. Bickelhaupt's staff never suspected this to be the case and never had cause to randomly test him in the years that they have been treating him for his chronic pain, although it would be their policy to conduct random testing if they suspected claimant was diverting his medications, or overmedicating himself. In fact, there was no connection whatsoever between the October 2003 drug screen and claimant's behavior while performing his job. Claimant had worked for All American for approximately 2 years without incident. Ms. Dayhoff testified that claimant was not suspected of taking or selling illegal drugs while on the job or reporting to work while impaired. Other than his unionization efforts, he appeared to be an ideal worker, receiving regular pay increases. Distilled to its essence, All American fired claimant for its belief that claimant smoked marijuana, an illegal act, for which he has not been charged or convicted, based upon a drug screen that may not have been his.

Based upon this record and these facts, the Board concludes that claimant did not exercise a lack of good faith in retaining his position with All American. Thus, claimant is entitled to his actual wage loss for that period of time following his termination and after he obtained subsequent employment on June 22, 2004, when he began to earn $320 per week.[20]

Finally, the ALJ refused to de-authorize Dr. Bickelhaupt as the treating physician as he concluded he had no jurisdiction to make such a finding based upon respondent's request to review and modify the original Award. The Board has considered the ALJ's decision on this issue as finds the ALJ's decision should be affirmed. There is no evidence that the treatment being offered by Dr. Bickelhaupt is not reasonable and necessary to cure and

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[19] In contrast, see the statutory criteria set forth at K.S.A. 44-510a. These criteria must be satisfied in order for a respondent to avoid compensability for an otherwise compensable injury.

[20] There was no argument that claimant's job search efforts after his termination from All American were less than sincere. Likewise, respondent did not argue that claimant's present job, earning $320 a week, was less than appropriate. Thus, claimant's actual wage loss will be used for purposes of calculating his work disability.

relieve claimant's ongoing complaints of pain due to his work related injury. Respondent may not like the treatment afforded by Dr. Bickelhaupt and respondent is free, as directed by the ALJ, to file the appropriate motion specifically requesting the ALJ to change or deauthorize the designated physician.

As for the evidentiary rulings made by the ALJ on the GAO report and the subsequent drug screen results performed and generated by LabCorp, the ALJ's rulings are affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated November 3, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Patrick Nichols, Attorney for Claimant
Gregory Worth, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director